No. 3011

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the PHOENIX HARDWARE COMPANY, a corporation, Bankrupt, J. B. LONG, J. W. LONG, MARGARET M. LONG and M. WEST,

Appellants,

vs.

CHARLES B. CHRISTY as Trustee of the ESTATE OF PHOENIX HARDWARE COMPANY, a corporation, Bankrupt,

Appellee.

PETITION FOR REHEARING

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and E. H. RYAN,
Of Counsel.

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Appellants respectfully petition the Court for a rehearing of this cause and in support of their application urge:

I

That the Court erred in affirming the order of the District Court based upon the finding of the Referee

> "that the said subscribers paid for the entire capital stock of said company the sum of Ten Thousand ($10,000.00) Dollars, and with said sum the said Phoenix Hardware Company, by and through its duly authorized officers and agents, purchased a stock of goods from the Arizona Hardware and Vehicle Company and paid therefor the sum of Ten Thousand ($10,-000.00 Dollars." Trans. Rec. p. 16.

It is upon this finding and the further finding that such payment of $10,000.00 was all that had ever been paid for the entire capital stock of $50,000.00 subscribed for, that the District Court and the Referee based their orders.

This Court has in its opinion rendered in this case correctly stated the facts with respect to the transaction whereby appellants obtained their stock in the Phoenix Hardware Company, viz.:

> "Immediately prior to the organization of this company, a few days, perhaps, J. B. Long and M. West purchased a stock of goods from the Arizona Hardware and Vehicle Company, an insolvent concern, for the sum of Nine Thousand Nine Hundred Fifty ($9,950.00) Dollars or near that figure, **the invoice value of which was about Twenty Thousand ($20,000.00) Dollars.** (Bold type ours.) This stock was turned over to the Phoenix Hardware Company in consideration of the entire capital stock of the company. * * * * *." P. 2 of typewritten opinion.

Thus it appears that the true facts and the facts found by the Referee are at variance. This Court, notwithstanding, has held that whether or not appellants actually subscribed for their stock is, in view of the true facts, immaterial for the purpose of determining their liability to pay the full par value of the stock actually issued to them. We beg leave to urge, however, that, even though the Court's ruling be correct in this respect, appellants are entitled to have the order of the District Court and of the Referee modified to conform to the facts as they appear from the evidence and which this Court has found to be the true facts. The order of the Referee was based upon the fact as found by him (erroneously) that appellants paid but Ten Thousand (10,000.00) Dollars for their stock, while according to the true facts, as stated by this Court, appellants paid therefor a certain stock of merchandise "the invoice value of which was about Twenty Thousand ($20,000.00) Dollars." The mere fact that appellants paid fifty cents on the dollar for such merchandise to an insolvent concern ought not to be determinative of its value. They might have paid nothing for it, and yet would be entitled to turn it in to the corporation at its fair market value; and the evidence is undisputed that its inventory value was its fair market value.

Let us assume that appellants received but two hundred shares of the capital stock of the company instead of five hundred shares, which would represent a par value of Twenty Thousand Dollars. Would they be liable as for an unpaid subscription to the ex-

tent of Ten Thousand ($10,000) Dollars in such case? Assuredly not, the value of the property and the par value of the stock being equal. So here the appellants should be given credit upon their implied subscription for the full Twenty Thousand ($20,000.00) Dollars instead of merely the Ten Thousand ($10,000.00) Dollars allowed by the Referee. If the order of the Referee as entered herin and affirmd by this Court be allowed to stand, these appellants can be subjected to successive assessments aggregating together with the fair market value of the property turned over to the company, ten per cent more than the par value of the capital stock of the company held by them.

Appellants therefore respectfully request that a rehearing be granted in this cause, and if thereat this Honorable Court cannot consistently dismiss the same for the reasons as hereinafter urged, that at least the decree of the District Court affirming the order of the Referee herein be further modified to give appellants credit for the payment of Twenty Thousand ($20,000.00) Dollars upon the capital stock held by them instead of but Ten Thousand ($10,000.00) Dollars.

II

Appellants further respectfully urge that this Court erred in holding that the statue of limitations has not barred a recovery from them of the balance of the purchase price unpaid by them upon their stock at the time they received it.

This Court says, in its opinion:

> "Balances due upon unpaid capital stock do not become due and payable until there has been a call or assessment." P. 9 of typewritten opinion.

Such, without question, is the general rule, and is substantially the same as laid down in 10 Cyc. at page 484. It is equally true, on the other hand, that certain conditions exist which create exceptions to the general rule. For instance, as further stated in 10 Cyc. at page 485,

> "No assessment is necessary * * * * where by the terms of his subscription he (the shareholder) has agreed to pay the amount subscribed by him at certain specified dates * * * *. Nor as a general rule are an assessment and call necessary to a right of action where the corporation has ceased to be a going concern and has gone into liquidation in any form * * **. It is equally obvious that the governing statute or contract of subscription may be such that the whole amount subscribed for will be presently due and payable without the necessity of any formal call, or even of any demand for the whole or any part of it by the directors."

That the case at bar falls within the exception is apparent from an examination of the record, for by the terms of the Articles of Incorporation of the Phoenix Hardware Company "the whole amount(of the capital stock) subscribed for" became "present-

ly due and payable without the necessity of any formal call." Article III of such Articles of Incorporation reads:

> "The amount of the capital stock authorized by this corporation is fifty thousand ($50,000) dollars. It shall be divided into five hundred (500) shares and the par value of each share shall be one hundred dollars ($100). The times when and the conditions upon which it shall be paid are as follows: **The whole thereof within (30) days after the same has been subscribed for,** (Bold type ours), provided that the Board of Directors of said Company may accept merchantable hardware at such prices as they may deem proper in part or full payment for any subscription to the stock of this corporation." Tr. Rec. P. 85.

The "governing statute" of the State of Arizona in effect at the time of the incorporation of the Phoenix Hardware Company provided:

> "The articles of incorporation must contain: "* * * * * The amount of capital stock authorized and the time when and the conditions upon which it is to be paid in." Sec. 1, Act 88, Ariz. Session Laws, 1908.

The transaction by which these appellants acquired their stock took place on March 19, 1907. So according to the exception to the general rule concerning calls and assessments as set forth in Cyc.,

Supra, the entire unpaid balance owing by these appellants became due thirty days thereafter, or on April 18, 1907, without the necessity of any call or assessment by the company. Having been due and payable on that date, the statute of limitations must have commenced to run therefrom, and had long since elapsed when the Referee levied his assessment. The case of Scoville vs. Thayer mentioned in the opinion of this Court as controlling of this question here, does but lay down the general rule, and ought not to influence this Court to decide the question adversely to appellant's contention. In fact, the persuasive force of that case should be the other way. The court said in that case:

> "In this case there was no obligation resting upon the stockholder to pay at all until some authorized demand in behalf of creditors was made for payment."

In the case at bar the time for payment was fixed by the Articles of Incorporation and the obligation to pay arose when that time arrived, viz., April 18, 1907.

Respectfully submitted,

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